

**DOCKET NUMBER 77**

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U.S. BANKRUPTCY CT  
SO. DIST. OF CALIF.

5 Attorneys for Alleged Debtor Francis Lopez

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8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10 SAN DIEGO DIVISION  
11

12 In Re:

13 FRANCIS J. LOPEZ,  
14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

BRIEF OF ALLEGED DEBTOR RE  
BURDEN OF PROOF UNDER  
SECTION 549

MSJ Hearing  
Date: June 26, 2006  
Time: 2:00 p.m.  
Ctm: 4

20  
21 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY  
22 JUDGE, TO PETITIONING CREDITORS ALAN STANLY, NORTHWEST FLORIDA  
23 DAILY NEWS:

24  
25 **I. ARGUMENT**

26 Alleged Debtor Francis J. Lopez ("Lopez") offered evidence in his Answer filed  
27 nearly one year ago in this case, his Motion for Summary Judgment, and in opposition to  
28 the MSJ of Alan Stanley that he had 23 creditors on June 30, 2005 and since there is only

1 one Petitioning Creditor, this case must be dismissed. Stanly has asserted that there are  
2 fewer than 12 creditors and therefore a single Petitioning Creditor is sufficient.

3 Of the 23 creditors, Stanly argued that nine should be excluded because they  
4 received avoidable transfers under Section 549 of the bankruptcy code. He alleged that  
5 eleven of the creditors received avoidable preference payments under Section 547. Of the  
6 23 total, eleven were supposedly excludable *solely* on the basis of Section 547 or 549 or  
7 both. The only evidence Stanly has ever offered that these creditors received avoidable  
8 transfers is that the creditors, in fact, actually received payments either pre-petition or post  
9 petition.

10 The burden of proof in a Motion for Summary Judgment is on the moving party.  
11 Summary judgment is proper only if there is no genuine issue as to any material fact and  
12 the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477  
13 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). When the court  
14 considers a motion for summary judgment, it must resolve all ambiguities and draw all  
15 reasonable inferences in favor of the party against whom summary judgment is sought.  
16 *Hamilton v. Smith*, 773 F.2d 461, 466 (2d Cir.1985).

17 As to Section 547, there is no showing in the MSJ that Lopez was insolvent when  
18 the payment was made or that the payment rendered him insolvent. There was no showing  
19 that the payment was not made in the ordinary course of business. There is no showing  
20 that the property transferred pre-petition was property "of the debtor." Indeed, virtually all  
21 of the payments were very small regular monthly payments to credit card companies or  
22 utility companies. All of the supposedly preferential transfers are less than \$600 (probably  
23 in total excluding Union Bank) which excludes the transfers from avoidance under Section  
24 547(c)(8).

25 As to Section 549, the bankruptcy code states:

26 (a) Except as provided in subsection (b) or (c) of this section, the  
27 trustee may avoid a transfer *of property of the estate--*

28 (1) that occurs after the commencement of the case; and

(2)

(A) that is authorized only under section 303(f) or 542(c) of this title;

or

(B) that is not authorized under this title or by the court.

As this is a chapter 7 involuntary case, post petition wages are not property of the estate. Proceeds of post-petition loans are not property of the estate. In fact, any property acquired after the petition date is not property of the estate unless it fits within one of the exceptions in Section 541(a)(5).

Federal Rule of Bankruptcy Procedure 6001 states: Burden of Proof as to Validity of Postpetition Transfer:

Any entity asserting the validity of a transfer under § 549 of the Code shall have the burden of proof.

At first blush it would appear that the burden is on Lopez to prove that the post petition transfers are not avoidable. A “transfer under Section 549” however, for purposes of Section 549, means *a transfer of property of the estate*. Stanly has the burden of proving that the post petition transfers were “of property of the estate.” Once he does that, Lopez has the burden of proving that the transfers were otherwise valid. This makes complete sense. Property of the estate is not supposed to be transferred without court approval or other authorization in the bankruptcy code. Typically, the person asserting the validity of the transfer is the transferee. Given the fact that it is probable that a complained of transfer of property of the estate was not authorized, it is logical that the burden should be on the recipient of the transfer.

*In re Countryside Manor, Inc.* 239 B.R. 443 (Bkrtcy.D.Conn.,1999.) the court said, there is no genuine issue as to the material facts sufficient to establish the elements of an avoidance action under Section 549 -that there was an unauthorized post-petition transfer of property of the estate. The defendant

1 concedes that it received the checks at issue, that they are drawn on the  
 2 account of the debtor-in-possession, that they were received after the  
 3 bankruptcy petition was filed, and that purchase of the parts made by the  
 4 defendant are not referred to in the court's cash collateral orders.

5 The burden of proving that the transfer at issue was valid, *therefore*,  
 6 shifts to the defendant. F.R.B.P 6001 ("Any entity asserting the validity of a  
 7 transfer under Section 549 of the Code shall have the burden of proof.").  
 8 (italics added)

9  
 10 In other words, once Stanly establishes that there was an unauthorized transfer of  
 11 property of the estate, Lopez must establish that the transfer was "valid."

12 *In re Kingsley*, 208 B.R. 918 (8th Cir.BAP,1997), the court said:  
 13 Section 549 involves a four-part inquiry. *The trustee must show* that: (1)  
 14 after commencement of the bankruptcy in question; (2) property of the  
 15 estate; (3) was transferred; and (4) the transfer was not authorized by the  
 16 bankruptcy court or by a provision of the Bankruptcy Code. (italics added)

17 *In re Calstar, Inc.*, 159 B.R. 247 (Bkrcty.D.Minn.,1993), the court  
 18 said:

19 Thus, to avoid the transfer, *the trustee must prove*:

- 20 1. That property of the estate was transferred;
- 21 2. after the filing of a petition;
- 22 3. which was not authorized by the Code or by the court. (italics added)

23  
 24 It would be difficult to imagine why the trustee could set forth a *prima facie* case of  
 25 avoidable post petition transfer merely by showing that a payment was made to a creditor  
 26 post petition. The code says a transfer of property of the estate. In other words, a transfer  
 27 of something that was under the control of the court.  
 28

1 Irrespective of the burden, Lopez has produced evidence as to five of the creditors  
 2 that the post petition payments were made by his wife or Noveon. These creditors are  
 3 Bank of America, Cingular Wireless, Cox Communications, Kelly Plantation Owners,  
 4 Okaloosa Gas District. As to Union Bank, the payments came from a post petition loan.  
 5 The payments to Quicken Platinum, Texaco and Verizon<sup>1</sup> came from post petition wages  
 6 or employee expense reimbursements of Lopez. Stanly acknowledges that Lopez  
 7 borrowed \$35,000 from his father since June 30, 2005 (UDF# 32). Stanly acknowledges  
 8 that Lopez earned \$12,500 just in 2006 (UDF#13). He acknowledges that Lopez has  
 9 received some \$50,000 from Noveon since its inception (UDF#14).

10 If the court will allow additional evidence, Lopez will provide proof that he had  
 11 little to no funds on hand on June 30, 2005 from which the post petition transfers of  
 12 property of the estate could have been made. The MSJ of Stanly admits this in UDF#26  
 13 "Other than his residence, Lopez has no assets of any significant value (more than \$10,000  
 14 equity). Lopez will also, if allowed, provide further evidence of his post petition earnings  
 15 and borrowings to show that all of the the post petition payments were not property of the  
 16 estate and therefore not avoidable.

## 17 18 **II. CONCLUSION**

19 Alleged Debtor prays that this court grant him summary judgment and dismiss this  
 20 case, and for other orders which are just.

21 Dated: July 6, 2006

22  
23 By: 


24 M. Jonathan Hayes  
 25 Attorney for Alleged Debtor Francis  
 26 Lopez  
 27  
 28

<sup>1</sup> There are no "undisputed facts" offered by Stanly with respect to Verizon.

1 Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011  
2 that the relief provided by the order is the relief granted by the court.

3  
4 Submitted by:

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6 By:

  
M. Jonathan Hayes  
Attorney for Francis J. Lopez

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1 PROOF OF SERVICE

2 I, MJ Hayes, declare:

3 I am a resident of the State of California and over the age of eighteen years, and not  
4 a party to the within action; my business address is 21800 Oxnard St., Suite 840,  
5 Woodland Hills, CA 91367. On July 6, 2006, I served the within documents:

6 BRIEF OF ALLEGED DEBTOR RE BURDEN OF PROOF UNDER SECTION 549

7 X by email

8 X by placing the document(s) listed above in a sealed envelope with postage  
9 thereon fully prepaid, in the United States mail at Los Angeles, California  
10 addressed as set forth below.

11 .. by causing personal delivery by \_\_\_\_\_ of the document(s) listed  
12 above to the person(s) at the address(es) set forth below.

13 .. by placing the document(s) listed above in a sealed \_\_\_\_\_  
14 envelope and affixing a pre-paid air bill, and causing the envelope to be  
15 delivered to a \_\_\_\_\_ agent for delivery

16 .. by personally delivering the document(s) listed above to the person(s) at the  
17 address(es) set forth below.

18 L. Scott Keehn  
19 Robbins & Keehn, APC  
20 530 B Street, Suite 2400  
21 San Diego, CA 92101

22 I am readily familiar with the firm's practice of collection and processing  
23 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal  
24 Service on that same day with postage thereon fully prepaid in the ordinary course of  
25 business. I am aware that on motion of the party served, service is presumed invalid if  
26 postal cancellation date or postage meter date is more than one day after date of deposit for  
27 mailing in affidavit.

28 I declare that I am employed in the office of a member of the bar of this court at  
whose direction the service was made.

Executed on July 6, 2006, at Woodland Hills, California.

23   
24 \_\_\_\_\_  
25 MJ Hayes